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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

7 MICHAEL F. LOWER, )

8 Plaintiff, )

9 v. )

10 MICHAEL J. ASTRUE,<sup>1</sup> )  
Commissioner of Social Security, )

11 Defendant. )  
12

CASE NO. C06-0915 MJP-MJB

REPORT AND  
RECOMMENDATION

13 Plaintiff Michael F. Lower appeals to the District Court from a final decision of the  
14 Commissioner of the Social Security Administration (the “Commissioner”) denying his  
15 application for Disability Insurance Benefits and Supplemental Security Income under the Titles  
16 II and XVI of the Social Security Act. For the reasons set forth below, it is recommended that  
17 the Commissioner’s decision be AFFIRMED.

18 I. PROCEDURAL HISTORY

19 Plaintiff protectively filed for Disability Insurance Benefits (“DIB”) and Supplemental  
20 Security Income (“SSI”) on February 23, 2004, (Tr. 43) alleging disability since January 3, 2004.  
21 Tr. 46-48. Plaintiff identified his impairments as paranoid schizophrenia, obsessive compulsive  
22 disorder (“OCD”), sleep apnea and depression. Tr. 55. The Social Security Administration  
23 denied Plaintiff’s application initially (Tr. 23-26) and upon reconsideration. Tr. 28-29. A hearing

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25 <sup>1</sup> Michael J. Astrue became Commissioner of Social Security on February 12, 2007.

1 was held before Administrative Law Judge (“ALJ”) Verrell Dethloff, on September 9, 2005. Tr.  
2 450-464. Plaintiff, who was represented by counsel, testified at the hearing. Tr. 453-461. The  
3 ALJ issued an unfavorable decision on March 1, 2006, finding that Plaintiff could return to his  
4 past relevant work and was not disabled within the meaning of the Social Security Act. Tr. 11-  
5 20. On June 15, 2006, the Appeals Council denied Plaintiff’s request for review, making the  
6 ALJ’s decision the final decision of the Commissioner. Tr. 6-8. Plaintiff timely filed his appeal  
7 with this Court.

## 8 II. THE PARTIES’ POSITIONS

9 Plaintiff requests that the Court reverse the Commissioner’s decision and remand for  
10 further administrative proceedings. Plaintiff argues that the ALJ erred by: (1) failing to consider  
11 or include Plaintiff’s exertional limitations in his Residual Functional Capacity (RFC) assessment  
12 when he found Plaintiff’s sleep apnea to be severe at step 2; (2) failing to find Plaintiff’s  
13 impairments do meet or equal any of the medical impairments listed in step 3; (3) failing to  
14 provide clear and convincing reasons for rejecting Plaintiff’s testimony regarding his fatigue from  
15 sleep apnea; (4) erroneously rejecting Plaintiff’s testimony regarding the degree of limitation he  
16 suffers as a result of his mental impairments; (5) improperly rejecting the testimony of lay  
17 witnesses, Ms. McCarthy, A.R.N.P and Ms. Werney, A.R.N.P; and (6) improperly “ignoring” the  
18 opinions of Dr. Sandvick and Dr. Parlatore regarding Plaintiff’s functional limitations. The  
19 defendant responds that the Commissioner’s decision should be affirmed because the ALJ applied  
20 the correct legal standards and supported his decision with substantial evidence.

## 21 III. STANDARD OF REVIEW

22 The court may set aside the Commissioner’s denial of social security disability benefits  
23 when the ALJ’s findings are based on legal error or not supported by substantial evidence in the  
24 record as a whole. *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence is

1 defined as more than a mere scintilla but less than a preponderance; it is such relevant evidence  
2 as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*,  
3 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving  
4 conflicts in medical testimony, and for resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
5 1039 (9th Cir. 1995). Where the evidence is susceptible to more than one rational interpretation,  
6 it is the Commissioner's conclusion which must be upheld. *Sample v. Schweiker*, 694 F.2d 639,  
7 642 (9th Cir. 1982).

#### 8 IV. EVALUATING DISABILITY

9 The claimant bears the burden of proving that he is disabled. *Meanel v. Apfel*, 172 F.3d  
10 1111, 1113 (9th Cir. 1999). Disability is defined as the inability to engage in any substantial  
11 gainful activity by reason of any medically determinable physical or mental impairment, which  
12 can be expected to result in death, or which has lasted or can be expected to last for a continuous  
13 period of not less than twelve months. 42 U.S.C. § 423 (d)(1)(A).

14 The Social Security regulations set out a five-step sequential evaluation process for  
15 determining whether claimant is disabled within the meaning of the Social Security Act. *See* 20  
16 C.F.R. § 416.920. At step one, the claimant must establish that he or she is not engaging in any  
17 substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). At step two, the claimant  
18 must establish that he or she has one or more medically severe impairments or combination of  
19 impairments. If the claimant does not have a "severe" impairment, he or she is not disabled. *Id.*  
20 at § (c). At step three, the Commissioner will determine whether the claimant's impairment  
21 meets or equals any of the listed impairments described in the regulations. A claimant who meets  
22 one of the listings is disabled. *See Id.* at § (d).

23 At step four, if the claimant's impairment neither meets nor equals one of the impairments  
24 listed in the regulations, the Commissioner evaluates the claimant's residual functional capacity

1 and the physical and mental demands of the claimant's past relevant work. *Id.* at § (e). If the  
2 claimant is not able to perform his or her past relevant work, the burden shifts to the  
3 Commissioner at step five to show that the claimant can perform some other work that exists in  
4 significant numbers in the national economy, taking into consideration the claimant's residual  
5 functional capacity, age, education, and work experience. *Id.* at § (f); *Tackett v. Apfel*, 180 F.3d  
6 1094, 1100 (9th Cir. 1999). If the Commissioner finds the claimant is unable to perform other  
7 work, then the claimant is found disabled.

#### 8 V. SUMMARY OF THE RECORD EVIDENCE

9 Plaintiff, who was born in September 1954, was 51 years old at the time of the ALJ's  
10 decision. Tr. 46. He served in the military between 1972 and 1974 and later obtained a Masters  
11 Degree in Theology. Tr. 46, 453. His past work included work as a full-time minister,  
12 custodian/janitor and a retail store greeter. Tr. 55-56. During his hearing, Plaintiff indicated that  
13 his tendonitis and sleep apnea limit his ability to work as a janitor because he is unable to hold a  
14 mop, fatigued and unable to stay awake. Tr. 453-56. Plaintiff has been diagnosed with paranoid  
15 schizophrenia, which has led to two incidents of psychotic behavior that required hospitalization.  
16 In the first incident, Plaintiff suffered a break from reality and fled to London to become King  
17 and believed the CIA to be after him. Tr. 57, 155, 174, 458. The second incident involved  
18 Plaintiff being hospitalized for auditory hallucinations in 1985. *Id.* Plaintiff has been prescribed  
19 medications for these psychological conditions since 1985. Tr. 155, 174. In February, 2006,  
20 Plaintiff was diagnosed with severe obstructive sleep apnea syndrome. Tr. 206. Other evidence  
21 relevant to Plaintiff's claims is incorporated into the discussion below.

#### 22 VI. THE ALJ'S DECISION

23 The ALJ found that Plaintiff had not engaged in substantial gainful activity since the  
24 alleged onset of his disability. Tr. 19. He determined that Plaintiff has the following severe

1 impairments: psychotic disorders, sleep apnea, and sleep-related breathing disorder. *Id.* The  
2 ALJ found that these impairments do not meet or equal one of the listed impairments in  
3 Appendix 1, Subpart P of the Regulations. *Id.*

4 The ALJ determined that Plaintiff's RFC allows Plaintiff to engage in a full range of  
5 physical work activity, with mental impairments restricting him to more simple repetitive jobs  
6 with limited interaction with the public. Tr. 20. The ALJ further found that Plaintiff's medically  
7 determinable functional psychotic disorders, sleep apnea, and sleep related breathing disorders do  
8 not preclude him from returning to his past relevant work as a janitor. *Id.* In reaching this  
9 conclusion, the ALJ found that Plaintiff's testimony regarding his limitations were not totally  
10 credible. *Id.* The ALJ ended his analysis at step four.

## 11 VII. DISCUSSION

### 12 A. Evaluation of Medical Evidence

13 Plaintiff argues that the ALJ erroneously "ignored" the findings of examining physicians  
14 Dr. David Sandvik and Dr. Anslem A. Parlatore regarding Plaintiff's functional limitations. Dkt.  
15 #15 at 16. Plaintiff claims that the ALJ's disregard for the physicians' reports is evidenced by  
16 his: (1) failure to explicitly reject the physicians' opinion, (2) failure to offer reasons to discount  
17 them, and (3) rejection of the corroborating opinions of both Advanced Registered Nurse  
18 Practitioners, (A.R.N.P.'s). *Id.* Dkt. #15 at 16. The Commissioner argues that Dr. Sandvik  
19 offered no opinion of Plaintiff's functional limitations and Dr. Parlatore merely accepted  
20 Plaintiff's subjective conclusion that his "paranoia interfered with his daily life" without support  
21 by clinical evidence. Dkt. #16 at 9-11.

22 The Commissioner is correct in pointing out that Dr. Sandvik renders no opinion on  
23 Plaintiff's functional limitations. But rather, Dr. Sandvik does assign a Global Assessment of  
24 Functioning in which he gives Plaintiff a score of 40 along with the comment that "[a]t times he

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1 is very paranoid with impairment in work, relationships, and judgment.” Tr. 157. The  
2 Commissioner argues that this score demonstrates that Plaintiff’s mental impairments do not  
3 meet the definition for serious functional impairment and cannot form the basis of disability.<sup>2</sup>  
4 Dkt. #16 at 10. In fact, the Commissioner is correct that this score alone does not satisfy or  
5 meet a finding of disability.

6 Plaintiff argues error by the ALJ’s rejection of Dr. Parlatore’s opinion. Dr. Parlatore’s  
7 opinion that Plaintiff showed marked limitations due to his paranoid behavior, hallucinations and  
8 thought disorder can form the basis of a functional impairment. Tr. 263. Dr. Parlatore found  
9 that Plaintiff showed marked functional limitations in his ability to relate appropriately to co-  
10 workers and supervisors and in his ability to interact appropriately in public contacts. Tr. 264.  
11 Finally, he found Plaintiff had severe limitations in his ability to respond appropriately to and  
12 tolerate the pressures and expectations of a normal work setting. *Id.* The ALJ’s finding of not  
13 disabled, however, appears to be derived in part, from the contradictory opinion of Matthew  
14 Comrie, Psy.D, a state agency psychologist. Tr. 177-180. Considered a medical expert on  
15 disability claims under the Act by the Government, (Dkt. #16 at 10), Dr. Comrie’s RFC  
16 assessment was that “Plaintiff has the RFC for a full range of physical work activity, with mental  
17 impairments restricting him to more simple repetitive jobs with limited interaction with the  
18 public.” Tr. 179-80.

19 It is true that Dr. Comrie’s opinion in 2004 does not address the physical limitations  
20 produced by the very severe sleep apnea objectively verified in 2005. The Commissioner argues,  
21 however, that Plaintiff’s testimony includes inconsistent reasons for leaving his previous jobs and

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23 <sup>2</sup>A GAF of 40 indicates that claimant has “[s]ome impairment in reality testing or commination or  
24 major impairment in several areas such as work or school, family, and is unable to work...” *See American*  
25 *Psychiatric Ass’n, Diagnostic & Statistical Manual of Mental Disorders*, 34 (4th T.R. ed. 2000). A GAF  
score of 41-50 indicates serious impairment in social, occupational or school functioning. *Id.*

1 that he also failed to follow prescribed regime by not replacing his broken CPAP. Dkt. #16 at 6-  
2 7. These reasons, however, were never raised by the ALJ and as such shall not be evaluated by  
3 this Court. *See Pinto v. Massanari*, 249 F.3d 840, 847 (9th Cir. 2001) (Court cannot affirm the  
4 decision of an agency on a ground that the agency did not invoke in making its decision.) (*Citing*  
5 *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575 (1947)). In fact, the ALJ's opinion  
6 refers to the polysomnogram which revealed very severe obstructive sleep apnea. As a medically  
7 determinable condition, sleep apnea is a likely basis for daytime drowsiness and a contributing  
8 cause for Plaintiff's loss of work. Thus, on these grounds, the ALJ's finding that Plaintiff was  
9 partially credible or "not totally credible is not supported by the record.

10 The ALJ's most salient reason for rejecting Dr. Parlatore's opinion and adopting Dr.  
11 Comrie's RFC assessment of mental impairments was that the 2005 clinic treatment notes of the  
12 treating nurse practitioners which identify inconsistencies in Plaintiff's statements. They also  
13 show that Plaintiff's proper use of the CPAP for his sleep apnea improved his mental and  
14 physical conditions starting in April through June 2005. This kind of medical improvement  
15 demonstrates that Plaintiff's sleep apnea is not a condition that will satisfy the 12 month duration  
16 requirement. *See*, 42 U.S.C. Section 423d(1)(A).

17 The ALJ also points to those notes which reflect improvement in the twenty year history  
18 of Plaintiff's treatment at Whatcom Counseling and Psychiatric Clinic. Tr. 173, 174. The ALJ  
19 cites to Plaintiff's own report that, "Abilify [his medication] is good. I have no paranoia  
20 whatsoever." Dkt. #14 at 17. Further, the ALJ cites to the notes from one of the nurse  
21 practitioners as saying, "In the course of treatment here, he has been maintained on the low  
22 doses of Haldol between 1 and 5 mg at bedtime." Tr. 14 at 17. This record constitutes  
23 substantial evidence of the ALJ's findings that Plaintiff is not disabled. Accordingly, Plaintiff's  
24 claims of error assigned one through five are unsupported.

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1 B. Lay Witness Testimony

2 In his sixth claim of error, Plaintiff argues that the ALJ improperly rejected the  
3 evaluations of nurse practitioners McCarthy and Werny's, in which they concluded Plaintiff's  
4 mental condition caused him marked and severe functional limitations. Dkt. #15 at 14-15. The  
5 Commissioner argues that the ALJ properly considered and weighed both "lay" opinions. Dkt.  
6 #16 at 12-14. A.R.N.P.'s are not doctors and under the Social Security Act regulations they are  
7 not acceptable medical sources. 20 C.F.R. §§ 404.1513.(d)(4), (e). The ALJ need only provide  
8 germane reasons to reject sources which are not medically acceptable. *Bayliss v. Barnhart*, 427  
9 F.3d 1211, 1218 (9th Cir. 2005). An ALJ may reject such testimony only if "reasons germane to  
10 each witness" are given. *Dodrill*, 12 F.3d at 919.

11 Unquestionably, the ALJ's reasons for according their opinions less weight are germane.  
12 In this case, the ALJ stated that from the A.R.N.P.'s evaluations from March 3, 2004 and August  
13 11, 2004, he found (1) no indication that a psychologist or psychiatrist had been involved in the  
14 forming of the opinions; and (2) that a finding of severe and marked impairment with regard to  
15 limitations on mental functioning is inconsistent with their 2005 treatment notes. Tr. 17-18. The  
16 record supports these findings. Tr. 196-199, 200-203. Nurse Practitioner Melinda Werney's  
17 August 11, 2004 evaluation of Plaintiff's mental functional limitations as "marked" and "severe"  
18 is inconsistent with her subsequent treatment notes of April through June, 2005. Tr. 200-03,  
19 211-49, 270-79. These treatment notes show that Plaintiff reports "doing good, feels pretty  
20 steady, no paranoia, no compulsive behaviors, no psychotic symptoms, denies depression,  
21 cheerful, denies side effects, continuous activity in the church, feels OCD is good, no  
22 hallucinations, no breaks with reality." Tr. 211-49, 270-79.

23 Properly considered as lay witness testimony, the A.R.N.P.'s notes shed considerable  
24 light on Plaintiff's course of treatment over the past year, demonstrating that he was adjusting to



1 his condition and his reliance upon medications. Plaintiff's sixth claim of error here is  
2 unsupported.

3 VIII. CONCLUSION

4 The Commissioner's determination to deny Plaintiff SSI and DIB benefits is free of legal  
5 error. Therefore based on the record evidence, the undersigned recommends that the  
6 Commissioner's decision be AFFIRMED. A proposed Order accompanies this Report and  
7 Recommendation.

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9 DATED this 29<sup>th</sup> day of May, 2007.

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12 MONICA J. BENTON  
13 United States Magistrate Judge  
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